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IN THE

Supreme Court of the United States

AMERICAN ISUZU MOTORS INC., BANK OF AMERICA, N.A., BARCLAYS BANK PLC, BRISTOL-MYERS SQUIBB COMPANY, BP P.L.C., CHEVRONTEXACO CORPORATION, *ET AL.*,

Petitioners,

—v.—

LUNGISILE NTSEBEZA, HERMINA DIGWAMAJE, KHULUMANI SUPPORT GROUP, *ET AL.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF THE CLEARING HOUSE ASSOCIATION L.L.C., AMERICAN BANKERS ASSOCIATION, BANKERS' ASSOCIATION FOR FINANCE AND TRADE, EUROPEAN BANKING FEDERATION, THE FINANCIAL SERVICES FORUM, THE FINANCIAL SERVICES ROUNDTABLE, INSTITUTE OF INTERNATIONAL BANKERS, SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, AND SWISS BANKERS ASSOCIATION IN SUPPORT OF PETITIONERS

THOMAS C. RICE
Counsel of Record
MARY ELIZABETH MCGARRY
AGNÈS DUNOGUÉ
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
(212) 455-2000
Counsel for Amici Curiae

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Pursuant to Rule 37.2 of the Rules of this Court, The Clearing House Association L.L.C. ("The Clearing House"), American Bankers Association, Bankers' Association for Finance and Trade, European Banking Federation, The Financial Services Forum, The Financial Services Roundtable, Institute of International Bankers, Securities Industry and Financial Markets Association, and Swiss Bankers Association (collectively, "*amici*"), with the consent of all parties, respectfully submit this brief *amici curiae* in support of petitioners American Isuzu Motors, Inc., *et al.*[1]

INTEREST OF THE *AMICI CURIAE*

The Clearing House and the other *amici* are domestic and foreign organizations concerned with the commercial banking and financial services industries and important public policy issues

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[1] Counsel for all parties received notice at least 10 days prior to the due date of *amici*'s intention to file this brief. The parties consented to the filing of this brief, and letters reflecting such consent have been filed with the Clerk. No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici* made a monetary contribution to the preparation or submission of this brief.

affecting them.[2] There will be an enormous impact on the business of their financial institution members if a new, judicially created cause of action for secondary liability in tort for a foreign nation's international law violations were to expose these institutions to litigation in U.S. courts, and potentially astronomical damage awards, for engaging in their basic businesses of lending and proving other ordinary financial services.

Amici respectfully submit that the petition for certiorari should be granted because the Court of Appeals for the Second Circuit has created great uncertainty for financial institutions by erroneously exercising jurisdiction under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, over civil claims against private actors for allegedly aiding and abetting international law violations, and by providing conflicting guidance as to the standard upon which liability may be imposed. The continuation of this litigation will have a chilling effect upon the business of *amici* 's members – business that is both critical to the economies of

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[2] The members of The Clearing House are ABN AMRO Bank N.V., Bank of America, N.A., The Bank of New York, Citibank, N.A., Deutsche Bank Trust Company Americas, HSBC Bank USA, N.A., JPMorgan Chase Bank, N.A., UBS AG, U.S. Bank, N.A., Wachovia Bank, N.A., and Wells Fargo Bank, N.A. All *amici* are described in the Appendix hereto. Certain members of these organizations or their affiliates are petitioners in this matter.

developing nations and an important component of foreign policy.

SUMMARY OF THE ARGUMENT

International financial institutions play a vital role in the economic growth and development of developing nations and, in turn, to achieving broader goals of social justice, peace and stability. If the standard created by the Second Circuit as a means of furnishing jurisdiction under the ATS were permitted to stand, it would have a substantial negative effect on this critical function because financial institutions would curtail their activities in developing nations.

The global financial services business of *amici*'s members, and the foreign trade and investment that it finances, are also important tools in international relations. These tools are blunted when financial institutions are deterred by the specter of potentially limitless tort liability even though the political branches wish to further foreign policy goals by encouraging participation in the economy of a friendly nation that may have a questionable human rights record. Moreover, U.S. international relations are strained when judicial expansion of private tort liability threatens the financial institutions of our allies.

Plaintiffs would have the district court exercise jurisdiction over an unprecedented private tort claim against U.S. and non-U.S. financial institutions for conduct that no international law

norm recognizes as actionable – engaging in financial transactions such as lending to another nation and its citizens, consistent with the foreign policies of those institutions' respective governments at the time. To do so, however, would contravene this Court's direction in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), that a claim based on the present-day law of nations must rest on an international norm both accepted by the civilized world and defined with specificity, as well as that decision's guidance on the other factors to be considered before exercising jurisdiction under the ATS over a private civil tort arising from a violation of international law.

The Second Circuit reversed the district court's order dismissing the complaints in these actions although there is no precedent in international law for imposing liability for the alleged conduct of the financial institutions or, indeed, for recognizing civil aiding and abetting liability for private actors generally. Further, the majority did not properly consider the significant collateral consequences, including the foreign relations implications, of recognizing such liability.

Finally, *Sosa* directed that, in assessing particular claims, federal courts should consider the "practical consequences" of providing a federal forum for those claims, and whether case-specific deference is appropriate. *Sosa*, 542 U.S. at 732-33. Here, the practical consequences of extending the scope of liability to the defendants for the conduct

alleged militate strongly against exercising ATS jurisdiction over these claims. Moreover, and as this Court suggested in *Sosa* in discussing these very actions, case-specific deference is called for due to the concerns raised by the governments of the United States and South Africa. For all these reasons, the decision of the Second Circuit was erroneous and certiorari should be granted to review it.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION BELOW THREATENS THE ABILITY OF FINANCIAL INSTITUTIONS TO PLAY THEIR VITAL ROLE IN INTERNATIONAL ECONOMIC DEVELOPMENT AND FOREIGN RELATIONS

A. The Importance of Financial Institution Participation in World Economies

Financial institutions, including *amici*'s members, are critical to the global economy, and their participation in developing countries is vital to the goals of economic development and growth. As the U.S. Treasury Secretary recently observed, "[f]inancial services are particularly important for developing countries because they are linked to increased economic growth and development. . . . Cross-country analysis shows that greater

involvement by private and foreign banks leads to more efficient lending and higher growth."[3]

Developing nations' economic development and participation in the global economy in turn help promote broader goals of social justice, stability, and peace. The U.S. Department of State has observed that, "[a]s more nations have integrated into the global economy, . . . the number of democracies in our world has increased dramatically – and with this advance of freedom has come greater stability and security and peace."[4] By contrast, as stated by the National Security Council, "[w]eak states and failed ones are a source

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[3] *State of the International Financial System: Hearing Before the H. Comm. on Financial Services*, 110th Cong. 59 (2007); *see also* World Bank, *Finance For Growth: Policy Choices in a Volatile World* 4 (2001) ("Most developing countries are too small to be able to afford to do without the benefits of access to global finance, including accessing financial services from foreign or foreign-owned financial firms. Facilitating the entry of reputable foreign financial firms to the local market should be welcomed too: they bring competition, improve efficiency, and lift the quality of the financial infrastructure.").

[4] Condoleezza Rice, U.S. Sec'y of State, Remarks at the Business Council (May 9, 2007), *available at* http://www.state.gov/secretary/rm/2007/may/84575.htm [hereinafter Sec'y of State Remarks].

of international instability[;] [o]ften, these states may become a sanctuary for terrorism."[5]

Progress toward these goals will be undermined if financial institutions are fearful that by engaging in business in developing nations, many of which have imperfect human rights records, they may later be held liable for abuses by those nations' governments.

The importance of the participation of international financial institutions in developing countries is forcefully demonstrated by the United States and South African governments' statements regarding the continuation of this litigation. In the Statement of Interest of the United States lodged with the district court, the Legal Adviser to the Department of State expressed concern that adjudication of these cases "may deter foreign investment where it is most needed." Petitioners' Appendix ("App.") 245a. The Republic of South Africa opposes continuation of this litigation in part because it interferes with that government's effort to create an environment conducive to foreign private-sector investment, which it believes is important to "faster economic growth offer[ing] the only way out of poverty, inequality, and unemployment." App. 305a.

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[5] Nat'l Sec. Council, *National Strategy for Combating Terrorism* 23 (2003), *available at* http://www.whitehouse.gov/news/releases/2003/02/counter_terrorism/ counter_terrorism_strategy.pdf.

B. The Importance of Financial Institutions to Foreign Policy

Economic engagement and economic sanctions are, respectively, carrots and sticks of U.S. foreign policy. *See, e.g.*, Sec'y of State Remarks, *supra* n.4 ("[f]ree trade is a critical tool" in the effort to "foster peace and stability between states" by "promot[ing] prosperity, good governance, and social justice within states"); Office of Foreign Assets Control, U.S. Dep't of the Treasury, *Foreign Assets Control Regulations for the Financial Community* 2 (2008) ("Economic sanctions are powerful foreign policy tools.").[6]

For example, the U.S. Department of the Treasury's Office of Foreign Assets Control administers and enforces laws and regulations that impose economic and trade sanctions against countries that are targeted based on various U.S. foreign policy goals, which include curtailing foreign human right violations. *See, e.g.*, Burmese Freedom and Democracy Act of 2003, Pub. L. No. 108-61, 117 Stat. 864 (2003) (codified at 50 U.S.C. § 1701 note). As to other countries, the United States encourages financial sector involvement, including through treaties and free trade agreements. *See, e.g.*, North American Free Trade Agreement ch. 14, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 & 605; United States-Colombia Trade

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[6] *Available at* http://www.ustreas.gov/offices/enforcement/ofac/regulations/facbk.pdf.

Promotion Agreement ch.12, U.S.- Colom., Nov. 22, 2006 (congressional approval pending), *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/ Colombia_FTA/Final_Text/ Section_Index.html.

The history of international dealings with South Africa during the apartheid era illustrates that economic engagement and sanctions are expressions of foreign policy. The regulation of financial institutions' and other entities' business in that country was a central part of the foreign policy of the United States, as well as other western nations. By Executive Order in 1985, followed by the Comprehensive Anti-Apartheid Act of 1986 ("CAAA"), the United States placed some restrictions on financing and trade, but did not mandate divestment or place a blanket ban on engaging in business in South Africa. *See* Exec. Order No. 12,532, 50 Fed. Reg. 36,861 (Sept. 9, 1985); 22 U.S.C. § 5001 note (1988) (repealed 1993). The United States believed its constructive engagement policy of economic incentives and sanctions would promote the end of apartheid. *See, e.g.*, 22 U.S.C. § 5002 (the purpose of the CAAA was "to guide the efforts of the United States in helping to bring an end to apartheid in South Africa").

Other countries in which foreign financial institutions involved in this litigation are based (including the United Kingdom, France, Germany, and Switzerland) also pursued policies of constructive engagement, restricting but not

prohibiting business dealings with South Africa, primarily as of the mid-1980s. *See* U.S. Dep't of State, *Report to the Congress on Industrialized Democracies' Relations with and Measures Against South Africa* 1-2, 17-21, 46-48, 50-52 (1987).

C. The Threat Posed by This Litigation

Plaintiffs have brought these actions seeking redress for the tens of millions of South Africans who were injured by South Africa's former apartheid regime. They have sued over 50 U.S. and foreign corporations, including more than a dozen financial institutions, on the theory that by doing business in or with South Africa these companies aided and abetted the regime's violations of international law. App. 82a (Korman, J.). In short, plaintiffs disagree with the policy of constructive engagement, and seek to have private entities that acted in accordance with that policy held liable, in tort, under the ATS.

Specifically as to the financial institution defendants, plaintiffs allege that these corporations extended loans and other financing to the government of South Africa and South African entities, and that such transactions helped "'insure that [the apartheid] system could function.'" App. 83a (Korman, J.) (quoting complaint). They do not allege that these defendants acted with the intent of furthering the apartheid regime's international law violations. App. 137a (Korman, J.). They do not link the injuries of any particular individual to

the conduct of any particular defendant, nor do they intend to attempt to do so. App. 84a-85a (Korman, J.). Rather, they broadly assert that "'any transfer of capital'" to South Africa aided and abetted apartheid: "'loans to the railways and harbors systems assisted in the mobilization of the armed forces; trade financing provided the computers and telecommunications equipment necessary to the efficient functioning of a modern army; [and] financing for housing project perpetuated the segregated housing of apartheid.'" App. 83a-84a (Korman, J.) (quoting complaint).

These claims, based on a highly speculative and attenuated theory of causation, threaten international financial institutions with virtually limitless liability for having engaged in normal business activities that were fully consistent with their home nations' foreign policies at the time.

Imposing liability upon financial institutions and other entities for the conduct alleged in these actions would constitute judicial second-guessing of our political branches' foreign relations policy of constructive engagement and thus raise serious separation of powers concerns. In addition, the existence of this litigation already has strained relations with U.S. allies who have expressed "profound concern" to the U.S. Department of State that their banks and corporations are named as defendants in these actions. App. 245a.

Moreover, the Second Circuit's recognition of liability for doing business with and in a nation

that has engaged in international law violations also threatens the ability of financial institutions to play their vital and salutary role in global economy and foreign relations. *See* Lucien J. Dhooge, *A Modest Proposal to Amend the Alien Tort Statute to Provide Guidance to Transnational Corporations*, 13 U.C. Davis J. Int'l L. & Pol'y 119, 134 (2007) (recognizing ATS liability for foreign state violation of international law "greatly increases the risk associated with foreign investment activities," which "could serve to significantly curtail future foreign investments as well as commercial activity"). As Judge Korman recognized, the majority's "newly minted theory of aiding-and-abetting liability" generates "tremendous uncertainty for private corporations . . . . This uncertainty, in turn, will undermine efforts by the United States to encourage reform in these countries through active economic engagement." App. 163a-164a (citation omitted).

Plaintiffs seek numerous forms of equitable, compensatory, and punitive relief, including $400 billion in damages, and the cost of defending this litigation alone is daunting. Further, the claims here are not unlike those of other ATS actions that similarly would make financial institutions that engaged in normal banking transactions liable to vast numbers of individuals injured by a foreign government. *See, e.g.*, *Mastafa v. Austl. Wheat Bd. Ltd.*, No. 07-CV-7955 (S.D.N.Y. filed Sept. 11, 2007) (action on behalf of all victims of torture, murder, and other crimes by Saddam Hussein's regime from

1996 through March 2003, alleging French bank maintained a United Nations escrow account from which funds were disbursed to the regime). In the wake of the Second Circuit's decision, financial institutions will inevitably be exposed to additional costly suits seeking many hundreds of billions of dollars in damages.

The prospect of further litigation can be expected, at a minimum, to raise the cost of doing business internationally, as well as to cause financial institutions to curb their activities in foreign nations with problematic human rights histories. Indeed, the very pendency of these actions threatens to impede the Executive and Legislative branches' ability to encourage economic activity that may be an important component of U.S. relations with a friendly nation. *See* U.S. Statement of Interest (to the extent this litigation deters foreign investment in the developing world, "it will compromise a valuable foreign policy tool"). App. 246a. For these reasons, certiorari should be granted to review the Second Circuit's decision to greatly expand the potential liability of institutions operating internationally.

II. THE DECISION BELOW IS INCONSISTENT WITH *SOSA* AND CERTIORARI SHOULD BE GRANTED TO UNDO ITS UNWARRANTED EXPANSION OF FEDERAL JURISDICTION

This Court held in *Sosa* that jurisdiction under the ATS depends on the recognition of a private

tort claim for violation of an international law norm, and directed that federal courts should not recognize a claim if the norm has "less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." 542 U.S. at 732. The Court exhorted the lower courts to practice "vigilant doorkeeping" in determining whether to recognize a civil tort for violation of international norms, 542 U.S. at 729, and set forth a series of reasons for exercising "great caution in adapting the law of nations to private rights," *id.* at 728. Among those reasons is that there may be "collateral consequences [to] making international rules privately actionable," including consequences that may implicate foreign relations. *Id.* at 727. As discussed above, the imposition of liability for engaging in customary financial transactions with or in another nation would have tremendous collateral consequences, chilling the cross-border investment that is critical to developing nations and an integral component of U.S. foreign policy.

Sosa also instructed that in assessing a plaintiff's particular claims, courts must exercise judgment about the "practical consequences" of making them available to litigants in the federal courts, and, where appropriate, practice "case-specific deference" in limiting ATS jurisdiction. 542 U.S. at 732-33 & n.21 (specifically noting that this litigation presented "a strong argument" for such case-specific deference).

Disregarding these clear instructions, the Second Circuit opened the door to private tort claims that have no basis in international law, greatly expanding the scope of potential liability for financial institutions without regard to the consequences of doing so, and remanded the matter for further proceedings although case-specific deference was called for in the jurisdictional analysis.

A. The Financial Institution Activity Complained of Is Not Actionable Under Established International Law

The complaints in these actions were properly dismissed by the district court because there is no precedent in international law for imposing liability upon a private entity for doing business in or with a country that commits international law violations. None of the purported international law sources relied upon by plaintiffs or the Second Circuit majority recognizes such conduct as actionable.

To the contrary, the most factually similar authority cited by plaintiffs and the Second Circuit, decisions from the Nuremberg tribunals, supports the proposition that engaging in the financing activities alleged here does not violate international law. Although the Nuremberg decisions are not competent sources of customary international law, *see Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 250-52, 263-64 (2d Cir. 2003),

one such decision, addressing charges brought against a bank executive for lending money to "various SS enterprises," is instructive. The tribunal specifically held:

> Loans or sale of commodities to be used in an unlawful enterprise . . . can hardly be said to be a crime. Our duty is to try and punish those guilty of violating international law, and we are not prepared to state that such loans constitute a violation of that law . . . .

United States v. von Weizsäecker ("The Ministries Case"), 14 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10* 308, 622 (William S. Hein & Co., Inc. 1997) (1949). As noted by Judge Korman, this decision underscores that there is no norm of international law establishing liability as to private actors for engaging in business with—and particularly, by providing financing to—States that violate international law. App. 79a-80a.

Expanding concepts of international law liability to normal lending and business activities would be particularly inappropriate in the context of this litigation given the constructive engagement policies of the United States and other western countries toward business with South Africa, discussed above. A principle in conflict with the practices of civilized nations cannot qualify as a customary international law principle, *United*

States v. Yousef, 327 F.3d 56, 92 n.25 (2d Cir. 2003), let alone one that has as "definite [a] content and acceptance among civilized nations [as] the historical paradigms familiar when [the ATS] was enacted," *Sosa*, 542 U.S. at 732.[7] The theory that financial institutions and other entities committed violations of international law by engaging in business activities that were permitted by the laws of their States of incorporation at the time, both raises concerns of retroactive application of a new standard of liability to conduct that was undertaken decades earlier,[8] and ignores the

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[7] Of course, engaging in customary banking-related activities is nothing like the historical paradigms for actionable international law violations, specifically offenses such as physical assaults against ambassadors, violations of safe conduct, and prize captures and piracy. That fact alone should have warranted greater caution in recognizing a private civil action here. The allegation that by engaging in financing activities the financial institutions aided and abetted South Africa's international law violations is also completely unlike the matters addressed in the authorities relied on by Judge Hall (involving direct participation by American citizens in hostile acts at sea or against a foreign settlement) as support for the notion that "the Founding Generation . . . understood the ATCA encompassed aiding and abetting liability," App. 70a n.5; as correctly pointed out by Judge Korman, these authorities do not support the broad proposition advanced by Judge Hall, App. 159a-163a.

[8] For ATS jurisdiction, the international law norm alleged to be violated must have had the requisite level of acceptance and specificity at the time of the conduct at issue. *See* App. 152a-154a (Korman, J.) (noting that

domestic laws of civilized nations as a fundamental source of international law. *See, e.g.*, *Sosa*, 542 U.S. at 734 (recognizing the "customs and usages of civilized nations" as a source of international law) (internal quotation marks omitted).

B. The Second Circuit Erroneously Created Civil Aiding and Abetting Liability

Each member of the Second Circuit panel interpreted *Sosa* differently, resulting in three individual opinions as well as a per curiam opinion, and sowing considerable confusion. Judge Korman, dissenting, correctly found that there were no well-established and universally recognized norms in effect at the time of the conduct alleged that would hold private individuals or corporations liable for aiding and abetting the government crimes underlying these actions, and therefore would have upheld the dismissal of the complaints. App. 122a-180a. Two members of the panel voted to reverse the order of dismissal, however, erroneously finding ATS jurisdiction over aiding and abetting claims. Judges Katzmann and Hall disagreed with each other over the basis on which to recognize civil aiding and abetting liability as well as the standard for imposing it, inadvertently but clearly illustrating the lack of consensus and specificity

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domestic and international law both prohibit retroactive application of legislation).

required under *Sosa* before an international law norm may provide a basis for ATS jurisdiction.

Judge Katzmann agreed with Judge Korman that international law must govern not only what constitutes an international law violation but also the scope of liability for such a violation. But unlike Judge Korman, Judge Katzmann relied upon international *criminal* law to determine whether there is ATS jurisdiction over *civil* claims. App. 32a-48a. International criminal law does not provide a basis for finding an established international law norm for civil aiding and abetting liability as to private actors, however. In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, this Court refused to make a similar leap, stating that although there is criminal liability for aiding and abetting criminal violation of Section 10(b) of the Securities Exchange Act of 1934, "it does not follow that a private civil aiding and abetting cause of action must also exist," and declining to find one. 511 U.S. 164, 190-91 (1994).

Further, *Sosa*'s requirement that an international norm be defined with specificity was not satisfied by this approach because, as Judge Katzmann acknowledged, there is a lack of consensus as to the *mens rea* requirement for aiding and abetting liability in the criminal law sources upon which he relied. App. 43a-48a. Judge Katzmann adopted a test that would impose liability where the defendant provided "practical assistance" to the primary violator that had a

"substantial effect," and did so "with the purpose of facilitating the commission of th[e] crime." App. 47a.

Judge Hall, in contrast, considered international law relevant solely for determining whether the alleged conduct of the primary actor constituted a violation, deeming it irrelevant whether international law recognizes aiding and abetting liability. This approach is directly contrary to the statement in *Sosa* that courts must consider "whether international law extends the scope of liability . . . to the perpetrator being sued . . . such as a corporation or individual." 542 U.S. at 732 n.20. Despite this Court's admonitions in *Sosa* against creating new private rights of action, *id.* at 725-28, Judge Hall created a new law of civil aiding and abetting liability in ATS cases. He claimed to be applying the "standard articulated by the federal common law." App. 68a. This Court has recognized, however, that the concept of aiding and abetting the tortious conduct of another "has been at best uncertain in application." *Central Bank*, 511 U.S. at 181.

Judge Hall would set a far lower bar for imposing liability than Judge Katzmann. Under this test, a defendant need not have acted with the purpose of facilitating an international law violation; "knowingly and substantially assisting" the principal tortfeasor, "encouraging, advising, contracting with, or otherwise soliciting" with actual or constructive knowledge of the principal's

violation, or providing the "tools, instrumentalities, or services" to commit the violations with active or constructive knowledge, would suffice. App. 71a. This broad definition could be read to render a party liable for making a loan to a borrower that it did not know, but allegedly should have known, was engaged in wrongdoing, a result that would constitute a substantial expansion of international law.

C. The Second Circuit Ignored the Guidance of *Sosa* in Deciding Whether to Recognize the Private Claims Asserted Here Against Financial Institutions

1. Practical consequences counsel against recognizing claims such as plaintiffs assert here.

In requiring courts to evaluate the "practical consequences" of recognizing a plaintiff's claims in an ATS action, this Court noted the relevance of whether international law extends the scope of liability for the given international law violation to the particular type of actor being sued. *Sosa*, 542 U.S. at 732 n.20. Here, recognizing plaintiffs' claims against financial institutions for engaging in their customary business would have practical consequences that counsel against exercising ATS jurisdiction.

This Court recently had occasion to evaluate the "practical consequences of an expansion [of

liability]" in *Stoneridge Investment Partners, L.L.C. v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008), in which it affirmed that the private right of action under Section 10(b) should not be extended to so-called "scheme liability." The Court noted that lawsuits such as the one before it that involve "extensive discovery and the potential for uncertainty and disruption . . . allow plaintiffs with weak claims to extort settlements from innocent companies," and was reluctant to "expose a new class of defendants to these risks." *Id.* at 765. The "practical consequences" might involve raising the cost of doing business, and deterring overseas firms from doing business in the United States. *Id.* at 764-65.

The parallels between *Stoneridge* and these actions extend well beyond the fact that both cases involve federal statutes onto which plaintiffs would engraft expansive theories of liability without a congressional mandate to do so. *See Sosa*, 542 U.S. at 726 ("the general practice has been to look for legislative guidance before exercising innovative authority over substantive law"). These actions also squarely present the concern expressed by the Court in *Stoneridge* with recognizing a private civil claim where the defendants' conduct is "too remote" from the plaintiffs' injury. *Stoneridge*, 128 S. Ct. at 769-70. Allegations that, but for the defendants' "involvement" in South Africa, apartheid "would have ended in 1985," or "would not have occurred in the same way," and therefore plaintiffs would not have been injured or would not have been injured

in the same way, would unmoor liability from any reasonable concept of causation. *See, e.g., Holmes v. Sec. Investor Protection Corp.*, 503 U.S. 258, 268 (1992) (requiring in RICO context a "direct relation between the injury asserted and the injurious conduct alleged"); *cf. Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 346 (2005) (requiring in securities context that "defendant's [alleged conduct] proximately caused the plaintiff's economic loss"). [9]

Additionally, to describe as "extensive" the discovery that would be required should this litigation continue would be a gross understatement. These actions are brought against scores of defendants located both in and outside of the United States, on behalf of millions of people for whose individual injuries redress is sought,

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[9] In an action by the descendants of slaves allegedly injured because, had defendants not "do[ne] business with slaveowners, there would have been less slavery," the Court of Appeals for the Seventh Circuit held those plaintiffs lacked standing, stating "this causal chain is too long and has too many weak links for a court to be able to find the defendants' conduct harmed the plaintiffs at all, let alone in an amount that could be estimated without the wildest speculation." *In re African-American Slave Descendants Litig.*, 471 F.3d 754, 759 (7th Cir. 2006). *See also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (standing requires "a causal connection between the injury and the conduct complained of"); *Allen v. Wright*, 468 U.S. 737, 759 (1984) ("The links in the chain of causation between the challenged . . . conduct and the asserted injury are far too weak for the chain as a whole to sustain respondents' standing.").

cover a span of 45 years, and center on activity undertaken in a foreign country, primarily by its former governing regime. Judge Korman noted the absence of any "'reasonable expectation that discovery will reveal evidence' to support [the allegations of plaintiffs' complaints]," even if those pleadings are amended yet again. App. 85a (quoting *Bell Atl. Corp. v. Twombly,* 127 S. Ct. 1955, 1965 (2007)). If these actions are allowed to proceed, discovery will by any measure undoubtedly be extensive.

This litigation also raises concern, expressed in *Stoneridge*, over "extort[ed] settlements." As Judge Korman observed, recognizing federal jurisdiction in these cases "would simply provide a vehicle to coerce a settlement." App. 85a; *see also Central Bank*, 511 U.S. at 189 (due to the uncertainty of rules governing aiding and abetting liability, entities "may find it prudent and necessary, as a business judgment, to abandon substantial defenses and to pay settlements in order to avoid the expense and risk of going to trial"). That plaintiffs here seek, among other forms of relief, more than $400 billion in damages substantiates Judge Korman's observation. The cost of defending these and similar ATS actions alone would be so staggering that further litigation can be expected to raise the cost of doing business and potentially decrease foreign firms' interest in the U.S. market.

Finally, and as noted above, permitting the continued prosecution of this litigation would

inevitably increase the number of massive and unmanageable cases brought under the ATS on similarly attenuated theories.

2. Case-specific deference concerns counsel against recognition of plaintiffs' claims.

It was improper for the Second Circuit majority to refuse to consider case-specific prudential concerns because this Court has identified such concerns as among the "principle[s] limiting the availability of relief in federal courts" under the ATS for violations of customary international law. *Sosa*, 542 U.S. at 733 n.21. Thus, considering these limitations does not, as the Second Circuit majority contended, improperly conflate the jurisdictional analysis with the cause of action analysis; rather, such an examination is part of courts' jurisdictional analysis whether to allow a private right of action to proceed, as correctly noted by Judge Korman. *See* App. 116a-119a. Consideration of the case-specific concerns at issue here, deference to the political branches and comity, demonstrates that these concerns mandate dismissal of this litigation.

First, in referring to "case-specific deference to the political branches," this Court in *Sosa* specifically pointed to these very cases, noting that "[i]n such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy." *Sosa*, 542 U.S. at 733 n.21. The

Statement of Interest of the United States indicates that this lawsuit, and others of its type, will cause significant foreign relations problems, both with the countries with which the United States is trying to engage, and with allies whose financial institutions are being subjected to U.S. courts' evaluation of conduct that they engaged in consistently with their own countries' policies. App. 244a-246a.

Second, comity concerns counsel that, because this litigation "touch[es] the laws and interests of other sovereign states," *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 543 n.27 (1987), "recognition" should be given to "the legislative, executive or judicial acts" of post-apartheid South Africa, *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). U.S. courts should "defer to the judgment of a democratic foreign government" regarding how "disputes arising from a mass tort occurring within its borders can be best resolved," to avoid disrupting relations with that government and frustrating its efforts in setting up "what it believes to be the most effective method of dealing with a difficult problem." *Bi v. Union Carbide Chem. & Plastics Co.*, 984 F.2d 582, 583, 586 (2d Cir. 1993) (affirming dismissal of claims where Indian government determined interests of Indian mass tort victims would be best served if it exclusively represented victims in all litigation and funded a plan to process all their claims); *see also Jota v. Texaco, Inc.*, 157 F.3d 153, 160 (2d Cir. 1998)

(deference should also be given "to the official position of a foreign state . . . on matters concerning actions of the foreign state taken within or with respect to its own territory").

Here, deference should be accorded to the South African government's prerogative to address matters relating to its nation, through policies and programs it has established to compensate the victims of apartheid and redress its effects—particularly in light of that government's repeatedly expressed view that this litigation is an affront to its sovereignty, a violation of its public policy of reconciliation, and a threat to its attempts to attract foreign investment as part of an effort to alleviate the very injuries alleged by plaintiffs. App. 290a-292a, 296a-300a, 304a-313a, 316a.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS C. RICE
Counsel of Record
MARY ELIZABETH MCGARRY
AGNÈS DUNOGUÉ
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, NY 10017
(212) 455-2000

Counsel for Amici Curiae

February 11, 2008

APPENDIX

APPENDIX

DESCRIPTIONS OF *AMICI CURIAE*

The Clearing House Association L.L.C. is an association of leading commercial banks dedicated to promoting the interests of its members and the commercial banking industry. It often presents the views of its members on important public policy issues that affect the commercial banking industry by, among other things, appearing as *amicus curiae* in this Court.

American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. Its members, located in each of the fifty States and the District of Columbia, include financial institutions of all sizes and types, both federally and state-chartered. ABA members hold a majority of the domestic assets of the banking industry in the United States.

Bankers' Association for Finance and Trade has 150 members, including U.S. and non-U.S. banks, entities that provide services to such banks, and non-U.S. bank trade associations. It provides an educational and networking platform for its members and is a catalyst in the development of solutions in international banking legislation and regulation.

European Banking Federation is the voice of the European banking sector, representing the interests of some 5000 European banks. It represents, defends, and promotes the interests of its members and promotes the development of the industry.

The Financial Services Forum is a non-partisan financial and economic policy organization comprised of the chief executive officers of 21 of the largest and most diversified financial institutions with business operations in the United States. It works to promote policies that enhance savings and investment in the United States and that ensure an open, competitive, and sound global financial services marketplace.

The Financial Services Roundtable is a national association the membership of which includes 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer.

Institute of International Bankers is an association of over 90 financial institutions headquartered in 35 countries that conduct banking, securities, and/or insurance operations in the United States. It is devoted to representing and advancing the interests of international banks in the United States to ensure that they receive the same competitive opportunities as domestic banking organizations and that their global operations are not subject to unjustified extraterritorial application of U.S. laws.

Securities Industry and Financial Markets Association ("SIFMA") brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

Swiss Bankers Association is the leading professional organization of the Swiss financial center, the members of which include banks and other financial institutions. Its main purpose is to maintain and promote the best possible framework conditions for the Swiss financial center, both at home and abroad.

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